

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 TERESA L. AMARO,) Case No. EDCV 08-1498-VAP
12 Plaintiff,) (AJWx)
13 v.) [Motion filed on October 31,
14 OPTION ONE MORTGAGE) 2008]
15 CORP., QUALITY LOAN)
16 SERVICES, CORP., and)
17 DOES 1 through 50)
inclusive,)
Defendants.)

19 The Court has received and considered the papers
20 filed in support of, and in opposition to, Defendant Sand
21 Canyon Corporation's Motion to Dismiss. For the
22 following reasons, the Court GRANTS the Motion.

I. BACKGROUND

A. Factual Allegations

26 On December 2, 2005, Plaintiff Teresa L. Amaro
27 ("Plaintiff") obtained an adjustable rate mortgage for
28 \$367,920 from Option One Mortgage Corporation ("Option

1 One"). (Compl. ¶ 7.) Pursuant to the mortgage agreement
2 with Option One, Plaintiff transferred her deed of trust
3 to Option One on December 2, 2005; Option One recorded
4 the deed on December 21, 2005. (Id. at ¶¶ 12, 13.)

5

6 Plaintiff alleges Option One did not explain "the
7 workings of the rate, how it is computed nor its inherent
8 volatility." (Id. at ¶ 9.) Furthermore, according to
9 Plaintiff, Option One "charged and obtained improper fees
10 for the placement of h[er] loan as "sub-prime" when [s]he
11 qualified for a prime rate mortgage which would have
12 generated less fees and interest. (Id. at ¶ 10.)

13

14 On May 21, 2008, Quality Loan Service filed a
15 substitution of trustee with the San Bernardino County
16 Recorder, thereby naming itself as the trustee of
17 Plaintiff's deed of trust. (Id. at ¶ 16.) Quality Loan
18 Service also sent to Plaintiff a "Notice of Breach and
19 Default and of Election to Cause Sale of Real Property
20 Under Deed of Trust" ("Notice of Breach") on that day.
21 (Id. at ¶ 17.)

22

23 **B. Procedural History**

24 Plaintiff filed a Complaint against Defendants Option
25 One Mortgage Corp. and Quality Loan Services, Corp., in
26 the California Superior Court, San Bernardino County,
27 with the following claims against both Defendants: (1)
28

1 Violation of the Truth in Lending Act ("TILA"), 15 U.S.C.
2 § 1611; (2) Violation of the Real Estate Settlement
3 Procedures Act ("RESPA"), 26 U.S.C. § 2605; (3) Violation
4 of the Home Ownership and Equity Protection Act of 1994
5 ("HOEPA"), 15 U.S.C. § 1602; (4) Violation of the Fair
6 Debt Collection Practices Act ("FDCPA"), 15 U.S.C. §
7 1692; (5) Breach of fiduciary duty; (6) Breach of
8 covenant of good faith and fair dealing; (7) Injunctive
9 relief; (8) Injunctive relief; (9) Declaratory relief;
10 (10) Fraud.

11

12 Defendant Option One Mortgage Corp., now known as
13 Sand Canyon Corporation, removed the case to this Court
14 on October 24, 2008 on the basis of federal question
15 jurisdiction, 28 U.S.C. § 1331. Defendant Quality Loan
16 Services did not join in the removal; Defendant Quality
17 Loan Services filed a "Declaration of Nonmonetary Status"
18 in the state court proceeding before removal, thereby
19 transforming it, the trustee under the deed of trust,
20 into a nominal third party, no longer required to
21 participate in the action pursuant to California Civil
22 Code § 29241.

23

24 Defendant Sand Canyon Corporation ("Defendant") filed
25 a "Motion to Dismiss the Action [Fed. R. Civ. Proc.
26 12(b)(6)] ("Motion") on October 31, 2008 and noticed a
27 hearing on the Motion for December 8, 2008. Defendant
28

1 moves the Court to dismiss Plaintiff's first, third,
2 fifth, sixth, and tenth claims. Plaintiff, appearing in
3 this action in pro se, filed Opposition on November 21,
4 2008. Defendant filed a Reply on December 1, 2008. On
5 December 2, 2008, the Court took the Motion under
6 submission for decision without hearing.

7 **II. LEGAL STANDARD**

8 Under Rule 12(b)(6), a party may bring a motion to
9 dismiss for failure to state a claim upon which relief
10 can be granted. As a general matter, the Federal Rules
11 require only that a plaintiff provide "'a short and plain
12 statement of the claim' that will give the defendant fair
13 notice of what the plaintiff's claim is and the grounds
14 upon which it rests." Bell Atlantic Corp. v. Twombly,
15 550 U.S. 544, 127 S. Ct. 1955, 1964 (2007) (quoting Fed.
16 R. Civ. P. 8(a)(2)). In addition, the Court must accept
17 all material allegations in the complaint -- as well as
18 any reasonable inferences to be drawn from them -- as
19 true. See Doe v. United States, 419 F.3d 1058, 1062 (9th
20 Cir. 2005); ARC Ecology v. U.S. Dep't of Air Force, 411
21 F.3d 1092, 1096 (9th Cir. 2005).

22
23 "While a complaint attacked by a Rule 12(b)(6)
24 motion to dismiss does not need detailed factual
25 allegations, a plaintiff's obligation to provide the
26 'grounds' of his 'entitlement to relief' requires more
27 than labels and conclusions, and a formulaic recitation
28

1 of the elements of a cause of action will not do." Bell
2 Atlantic, 127 S. Ct. at 1964-65 (citations omitted).
3 Rather, the allegations in the complaint "must be enough
4 to raise a right to relief above the speculative level."
5 Id. at 1965.

6

7 Although the scope of review is limited to the
8 contents of the complaint, the Court may also consider
9 exhibits submitted with the complaint, Hal Roach Studios,
10 Inc. v. Richard Feiner & Co., 896 F.2d 1542, 1555 n.19
11 (9th Cir. 1990), and "take judicial notice of matters of
12 public record outside the pleadings," Mir v. Little Co.
13 of Mary Hosp., 844 F.2d 646, 649 (9th Cir. 1988).

14

15

III. DISCUSSION

16 Defendant moves the Court to dismiss Plaintiff's
17 first (TILA violation), third (HOEPA violation), fifth
18 (breach of fiduciary duty), sixth (breach of covenant of
19 good faith and fair dealing), and tenth (fraud) claims.
20 Plaintiff opposes the Motion, only arguing the propriety
21 and sufficiency of her first claim, for TILA violations.¹

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¹ The Court could grant Defendant's Motion with respect to claims three, five, six, and ten based only on Plaintiff's failure to oppose. In the interest of justice, however, the Court evaluates each of Plaintiff's claims, even though Plaintiff only opposes Defendant's Motion as to her first claim.

1 **A. Claim One - TILA Violation**

2 Plaintiff alleges Defendant violated 15 U.S.C. § 1601
3 ("TILA") by failing to validate or "make a full accounting
4 and the required disclosures as to the true finance
5 charges and fees," "improperly retained funds belonging
6 to Plaintiff," and failed to "disclose the status of the
7 ownership of the loans. (Compl. at ¶ 23.) Plaintiff
8 seeks rescission of the loan, compensatory damages,
9 attorneys' fees, and punitive damages. (*Id.* at ¶¶ 24-
10 27.)

11
12 Defendant argues Plaintiff's claim for compensatory
13 damages is barred by the applicable statute of
14 limitations period of one-year. 15 U.S.C. § 1640(e).
15 Plaintiff executed the loan documents on December 2,
16 2005; Plaintiff did not file this action until September
17 17, 2008. Based on the face of the Complaint, the claim
18 is barred.

19
20 Plaintiff argues the doctrine of recoupment allows
21 her to raise the claim, despite bringing it beyond the
22 statute of limitations period. (See Opp'n at 8.)
23 According to Plaintiff, "a party may assert recoupment as
24 a defense after a statute of limitations period has
25 lapsed." (*Id.*) Plaintiff argues she may use this
26 defense affirmatively in this case because she brings it

1 in response to Defendant's non-judicial foreclosure
2 proceeding. (Id.)

3

4 Plaintiff's contention lacks merit. A party may
5 bring a claim for recoupment after TILA's one-year
6 statute of limitations period has expired, but only as a
7 defense in an action to collect a debt. 15 U.S.C. §
8 1640(a). Here, Plaintiff's affirmative use of the claim
9 is improper and exceeds the scope of the TILA exception,
10 permitting recoupment as a defensive claim only. See
11 id.; Beach v. Ocwen Fed. Bank, 523 U.S. 410, 415-16
12 (1998). Accordingly, the Court grants Defendant's Motion
13 with respect to Plaintiff's first claim, without leave to
14 amend.

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16 **B. Claim Three - HOEPA Violation**

17 Plaintiff alleges Defendant violated 15 U.S.C. § 1602
18 ("HOEPA") because her loan "was placed and administered
19 and otherwise utilized without regard to Plaintiff's
20 income or cash flow and with the intention of inducing a
21 default." (Compl. at ¶ 37.) As Defendant argues,
22 HOEPA's protections apply only to certain mortgages. See
23 15 U.S.C. § 1602(aa). Plaintiff fails to allege her loan
24 qualified for HOEPA's additional protections. Without
25 alleging this factual basis for her claim, Plaintiff
26 fails to state a claim for which relief can be granted.
27 Accordingly, the Court grants Defendant's Motion with
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1 respect to Plaintiff's third claim, with leave to amend.
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3 **C. Claim Five - Breach of Fiduciary Duty**

4 Plaintiff alleges Defendant breached its fiduciary
5 duty, arising out of Defendant's "position of trust by
6 virtue of [its] expertise," to her by providing her a
7 loan "without due care to the best interest of Plaintiff
8 or for the protection of h[er] rights." (Compl. at ¶¶
9 47, 49.) In its Motion, Defendant argues no fiduciary
10 duty exists between itself and Plaintiff. (See Mot. at
11 4-5.)

12
13 Typically, there is no fiduciary duty between a
14 mortgage lender and a debtor. See Downey v. Humphreys,
15 102 Cal. App. 2d 323, 332 (1951) ("A debt is not a trust
16 and there is not a fiduciary relationship between debtor
17 and creditor as such"); Price v. Wells Fargo Bank, 213
18 Cal. App. 3d 465, 476 (1989) (applying same principle "to
19 relationship between a bank and its loan customers").
20 Plaintiff has not alleged any special relationship that
21 could override this principle. Connor v. Great Western
22 Sav. & Loan Assoc., 69 Cal.2d 850, 864 (1968); Wolf v.
23 Superior Court, 107 Cal. App. 4th 25, 29 (2003).
24 Plaintiff does not state a claim for which relief can be
25 granted because no fiduciary relationship exists here.
26 Accordingly, the Court grants Defendant's Motion with
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1 respect to Plaintiff's fifth claim, without leave to
2 amend.

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4 **D. Claim Six - Breach of Covenant of Good Faith and Fair
5 Dealing**

6 Plaintiff alleges Defendant breached the covenant of
7 good faith and fair dealing by "the commencement of
8 foreclosure proceedings upon the property lawfully
9 belonging to Plaintiff without the production of
10 documents demonstrating the lawful rights for the
11 foreclosure." (Compl. at ¶ 54.) Defendant argues this
12 claim does little more than restate Plaintiff's claim for
13 breach of fiduciary duty and that the claim should fail
14 because Defendant does not owe Plaintiff a duty of utmost
15 care.

16

17 The implied covenant of good faith and fair dealing
18 arises between the parties to a contract. See Price, 213
19 Cal. App. 3d at 478; Rest. 2d Contracts § 205 ("Every
20 contract imposes upon each party a duty of good faith and
21 fair dealing in its performance and its enforcement.").
22 Although Defendant, as a party to the mortgage contract,
23 is bound by the covenant, the covenant does not "impose
24 any affirmative duty of moderation in the enforcement of
25 legal rights." Price, 213 Cal. App. 3d at 479.
26 Plaintiff's claim alleges that Defendant lacked
27 documentation to support the foreclosure; this does not
28

1 state a claim for a breach of the covenant. See Tina v.
2 Countrywide Home Loans, Inc., 2008 WL 4790906, at *4
3 (S.D. Cal., Oct. 30, 2008). Accordingly, the Court
4 grants Defendant's Motion with respect to Plaintiff's
5 sixth claim, with leave to amend.

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7 **E. Claim Ten - Fraud**

8 Plaintiff's tenth claim alleges Defendant's
9 representations in the Notice of Default, sent to
10 Plaintiff, contained two false representations: (1)
11 "Documents were not provided to the trustee that showed
12 that Option One was the [b]eneficiary and entitled to the
13 payments;" and (2) "At the time Quality made the
14 representations they [k]new they were false and were made
15 for the sole purpose of inducing reliance." (Compl. at ¶
16 89.) Plaintiff alleges she relied on those false
17 statements to her detriment and has been damaged "in
18 having [her] home wrongfully placed in foreclosure and a
19 slander of [her] title, and being required to become
20 involved in this litigation." (Id. at ¶ 90.) Defendant
21 argues Plaintiff's claim for fraud has not been plead
22 with particularity.

23

24 Fraud must be plead with particularity. See Fed. R.
25 Civ. Proc. 9(b). Even if a complaint does not assert
26 explicitly a claim for fraud and even if none of the
27 claims in a complaint "sound in fraud," any allegations
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1 of fraudulent conduct in a complaint must be plead with
2 particularity. Vess v. Ciba-Geigy Corp. USA, 317 F.3d
3 1097, 1102-05 (9th Cir. 2003).

4

5 To satisfy the requirements of Rule 9(b), "[a]
6 plaintiff must set forth *more* than the neutral facts
7 necessary to identify the transaction. The plaintiff must
8 set forth what is false or misleading about a statement,
9 and why it is false." Id. at 1106 (quoting Decker v.
10 GlenFed, Inc., 42 F.3d 1541, 1548 (9th Cir. 1994)). Here,
11 Plaintiff includes the statements she relied upon, but
12 fails to demonstrate what is misleading about them or why
13 they are false. Accordingly, Plaintiff's averments of
14 fraud do not satisfy the requirements of Rule 9(b). The
15 Court grants Defendant's Motion with respect to Plaintiff's
16 tenth claim, with leave to amend.

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IV. CONCLUSION

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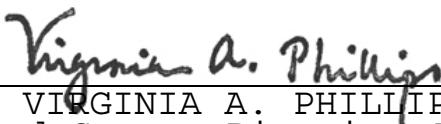
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Dated: January 14, 2009



VIRGINIA A. PHILLIPS
United States District Judge